TITLE 329 SOLID WASTE MANAGEMENT BOARD

#09-365 (SWMB)

SUMMARY/RESPONSE TO COMMENTS RECEIVED FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from November 4, 2009, through December 4, 2009, on IDEM's draft rule language. IDEM received comments from the following parties:

Battery Council International (BCI)
Barnes and Thornburg, LLP, (BT)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: Proposed 329 IAC 3.1-11.1-3(4) puts a 90-day storage time limit on retailers, wholesalers, manufacturers, and auto salvage yards. This provision is inconsistent with the exemption for generators under 40 CFR 266 Subpart G, which exempts such entities from the 90 day storage requirements of 40 CFR 262. Patchwork requirements at the state level only serve to frustrate collection and recycling efforts. We therefore request that this 90 day requirement be removed or, at the very least, extended to one year (365 days). Three hundred sixty-five days is the maximum storage time allowed for batteries under the Universal Waste Rule (40 CFR Part 273). (BCI)

Response: IDEM has removed auto salvage yards and the ninety (90) day storage time limit from 329 IAC 3.1-11.1-3. This is in recognition of the fact that IC 13-20-16-3 already states that a retailer or wholesaler that accepts a used lead acid battery may not retain possession of the battery for more than 90 days.

Comment: Proposed 329 IAC 3.1-11.1-4(2)(A) requires that large quantity intermediate storage facilities such as warehouses notify the IDEM of the location of storage sites. Proposed 329 IAC 3.1-11.1-4(1)(E) and 3.1-11.1-4(2)(F) also require that small and large quantity intermediate storage facilities have spill response plans maintained on site, respectively.

It is not uncommon for battery manufacturers, wholesalers and secondary lead smelters to use commercial storage warehouses to store used lead-acid batteries when they have quantities that exceed their own storage capacity. BCI is concerned that these commercial warehouses will be wary and refuse to accept these batteries for storage if they have to register with the IDEM. This would inhibit the existing recycling infrastructure that is now so successful (footnote 1: The latest calculated U.S. recycling rate for lead from lead-acid batteries is 96% for the years 2004-2008. BCI National Recycling Rate Study, August 2009, SmithBucklin). Furthermore, the proposed provision is inconsistent with 40 CFR 266 Subpart G, and patchwork requirements at

the state level only serve to frustrate recycling.

Moreover, requiring these facilities storing lead-acid batteries to maintain spill response plans on site would be inconsistent with both 40 CFR 266 Subpart G and the Universal Waste Rule. After the IDEM's 266.80 equivalent rule is amended, the exact same lead-acid batteries could be handled as Universal Waste in Indiana and no spill response plans would be required. The IDEM is proposing inconsistent regulation without explanation.

BCI requests that both the proposed notification and spill response plan requirements be eliminated. Mandating that the warehouses comply with the regimented storage requirements, as proposed under 329 IAC 3.1-11.1-4(1) and 3.1-11.1-4(2), should be sufficient to ensure that batteries in commercial warehouses are properly managed, while still keeping such facilities available for storage. (BCI)

Response: IDEM believes that 329 IAC 3.1-11-4(2)(A) reflects very basic best management practices and will provide clarity to intermediate storage facilities as to management expectations. We do not believe a simple notification requirement is overly burdensome. Both requirements are consistent with the universal waste rules cited by the commentor. IDEM agrees with BCI comments regarding spill response plans and the requirement for spill response plans has been deleted.

Comment: Proposed 329 IAC 3.1-11.1-5(d)(1) and (2) require asphalt or concrete surfaces in loading and unloading areas to be maintained in "good condition" and that cracks and gaps be repaired "as soon as possible". BCI is concerned that these requirements are too subjective and not practicable. The term "good condition" needs to be qualified so that it does not lead to conflicting interpretations by the regulated community and IDEM inspectors. "As soon as possible" also needs to be clarified, since it is difficult to do asphalt or concrete repairs except during shut down periods, particularly because of daily water flushing requirements in air permits. This would cause a direct interference and regulatory conflict with performing repairs. BCI therefore asks that the language in 329 IAC 3.1-11.1-5(d)(1) and (2) be revised to read: "Loading and unloading areas shall be: (1) on an asphalt or concrete surface maintained in good condition. Asphalt and concrete are maintained in good condition by making necessary repairs to significant cracks or gaps as soon as practicable, taking into account facility operation and shut-down schedules and environmental permit requirements." (BCI)

Response: Loading and unloading areas are already regulated by the application of the general facility standards incorporated by reference in 329 IAC 3.1-11.1-5(a); therefore, rather than revising the language IDEM deleted 329 IAC 3.1-11.1-5(d)(1) and (2).

Comment: Proposed 329 IAC 3.1-11.1-5(c) says that trailers of incoming whole spent lead-acid batteries may be staged on an asphalt or concrete surface maintained in "good condition". Again, BCI is concerned that this term is so subjective that it could lead to confusion among the regulated community and IDEM inspectors. BCI recommends that the language be revised to read: ".. trailers of incoming whole spent lead-acid batteries may be stored on asphalt or concrete maintained in good condition. Asphalt and concrete are maintained in good condition

by making necessary repairs to cracks or gaps as soon as practicable, taking into account facility operation and shutdown schedules and environmental permit requirements." (BCI)

Response: Current hazardous waste rules and permits do not address "staging" areas as provided for in this proposed rule. A major purpose of this rule is to resolve long standing differences of opinion regarding the regulatory status of staging areas. These requirements (if adopted), will be reflected in future permits where facility specific concerns may be resolved through the permitting process. IDEM is maintaining the draft rule language as is.

Comment: Proposed 329 IAC 3.1-11.1-5(d)(2) requires loading and unloading areas at battery recycling facilities to be inspected daily for spills and deterioration. However, secondary lead smelters are already subject to effective inspection schedules that are set forth in facilities' Part B permits, which the IDEM prepares. BCI therefore recommends that the inspection schedule in 329 IAC 3.1-11.1-5(d)(2) be revised to be consistent with existing Part B permit inspection schedules. Further, BCI believes that the term "deterioration" is too broad and subjective. To address both issues, BCI suggests that 329 IAC 3.1-11.1-5(d)(2) be revised to read: "(2) inspected for spills and significant cracks and gaps on a schedule consistent with the facility's RCRA Part B permit." (BCI)

Response: IDEM believes the cite referenced by BCI in this comment is actually for 329 IAC 3.1-11.1-5(d); rather than limited to (d)(2). IDEM agrees that loading and unloading areas are already regulated by the application of the general facility standards incorporated by reference in 329 IAC 3.1-11.1-5(a). All of 329 IAC 3.1-11.1-5(d) has been deleted.

Comment: Proposed 329 IAC 3.1-11.1-5(e) seeks to regulate the recycling process which is exempt from hazardous waste regulations pursuant to 40 CFR 261.6(c)(1), and should be substantially revised. First, the draft rule defines the term "intermittent storage" as storage that occurs after reclamation has commenced and before it is complete. See proposed 329 IAC. 3.1-11.1-2(f). This is inconsistent with the scope of the recycling exemption in 40 CFR. 261.6(c)(1), which has been interpreted to mean that "the temporary staging of materials during and incidental to the recycling process . . . is not subject to regulation", and the fact that the recovered battery components "are an integral part of the recycling process [and] are not discarded and thus are exempt from RCRA regulations."(footnote 2: Ind. Dept. Of Environmental Management v. Quemetco, Inc., Cause No. N-113, Modification of the Final Order of the Solid Waste Management Board, Conclusions of Law Numbers 10 and 12 (1991)). Moreover, the draft rule regulates the recycling of spent lead-acid batteries differently from the recycling of other hazardous waste by making "intermittent storage" by battery reclaimers subject to regulation, while "intermittent storage" by other hazardous waste recyclers is not subject to regulation. IDEM has provided no justification for such inconsistent regulation
Second, the draft rule would require that new lead-acid battery breaking facilities or new secondary lead smelters obtain a containment building permit in accordance with 40 CFR 264 Subpart DD to store partially reclaimed waste in piles. See proposed 329 IAC 3.1-1.1-5(g). However, as indicated above, 40 CFR 261.6(c)(1) exempts the recycling process from regulation

and since the "temporary storage and piling are integral parts of the cracking/recycling process, the components are exempt pursuant to 329 IAC 3-3-6(c)(1)" [now 40 C.F.R. 261.6(c)(1)]. (footnote3: See footnote 2). Thus, IDEM is seeking to require that the recycling process which is exempt from the hazardous waste regulation be conducted within a RCRA regulated unit. Finally, the draft rule proposes that existing battery breaking/secondary smelters that have "intermittent storage" meet various requirements. See the proposed 329 IAC 3.1-11.1-5(e) general provisions and 329 IAC 3.1-11.1-7(2) regarding storage area closure. As discussed above, what IDEM calls "intermittent storage" is an integral part of the battery cracking/recycling process which is exempt from RCRA regulations under 40 CFR 261.6(c)(1). IDEM has not provided any explanation for imposing regulations on an integral part of the battery recycling process, nor has IDEM justified why battery recyclers should be subject to regulations not imposed on other hazardous waste recyclers. In addition, such regulation is burdensome with no corresponding benefit.

For all of the reasons above, BCI suggests that IDEM delete 329 IAC §§ 3.1- 11.1-2(f), 3.1-11.1-5(e), (f) and (g) and 329 IAC 3.1-11.1-7(2). (BCI)

Response: It is beyond the scope of these comments to debate in-depth prior interpretations of regulations in an Indiana administrative proceeding. It suffices to say that the recycling exemption at 40 CFR 261.6(c)(1) is not applicable to the case-by-case recycling activities regulated under 40 CFR part 266. This is clearly indicated in the language preceding the recycling process exclusion at 40 CFR 261.6(a)(2). IDEM is not bound by prior interpretations of regulatory language in this new rulemaking. In addition we do not consider "intermittent storage" (even if the recycling process exclusion was applicable) to be included within the recycling process exemption.

IDEM believes these rules are much clearer and less subject to debate than current rules. They will also remove inconsistencies in how our lead acid battery reclaimers have been regulated. Upon adoption, prior interpretations of the old rules will be a moot issue.

Comment: The draft rule should not regulate the recycling process because it is exempt from hazardous waste regulation. The draft rule seeks to regulate the recycling process which is exempt from hazardous waste regulations pursuant to 40 CFR. 261.6(c)(1). First the draft rule defines the term "intermittent storage" as storage that occurs after reclamation has commenced and before it is complete. See Draft 329 IAC 3.1-11.1-2(f). However, the scope of the recycling exemption in 40 CFR 261.6(c)(1) has been interpreted to mean that "the temporary staging of materials during and incidental to the recycling process.... is not subject to regulation" and that the recovered battery components "are an integral part of the recycling process [and] are not discarded and thus are exempt from RCRA regulations." (footnote 1: Ind. Dept. Of Environmental Management v. Quemetco, Inc., Cause No. N-113, Modification of the Final Order of the Solid Waste Management Board, Conclusions of Law Numbers 10 and 12 (1991)). Moreover, the draft rule regulates the recycling of spent lead acid battery differently from the recycling of other hazardous waste recyclers is not subject to regulation. IDEM has provided no justification for such differential regulation.

Secondly, the draft rule requires that new lead acid battery breaking facilities or secondary lead smelters obtain a containment building permit in accordance with 40 CFR 264 Subpart DD to store partially reclaimed waste in piles. See Draft 328 IAC 3.1-11.1-5(g). As indicated above, 40 CFR 261.6(c)(1) exempts the recycling process from regulation and because the "temporary storage and piling are integral parts of the cracking/recycling process, the components are exempt pursuant to 329 IAC 3-3-6(c)(1)" [now 40 CFR 261.6(c)(1)]. (footnote 2: See footnote 1). Thus IDEM is seeking to require that the recycling process, which is exempt from the hazardous waste regulation, be conducted within a RCRA regulated unit. Finally, the draft rule proposes that existing battery breaking/secondary smelters that have "intermittent storage" meet various requirements. See Draft 329 IAC 3.1-11.1-5(e). As discussed above, what IDEM calls "intermittent storage" is an integral part of the battery cracking/recycling process nor has IDEM justified why battery recyclers should be subject to regulations not imposed on other hazardous waste recycler. Therefore, IDEM should delete 329 IAC section 3.1-11.1-2(f), 3.1-11.1-5(d), (e), (f) and (g), and 3.1-11.1-7 from the draft rule. (BT)

Response: Most of this comment is the same as the BCI comment above and the response is the same. IDEM's approach to "intermittent storage" is the same everywhere. IDEM is not aware of other recycling facilities of regulated recyclable materials being treated differently. The commentor has suggested the draft rule requires a containment building permit for new facilities. The rule language cited actually only requires a permit if an exemption is not granted.

Comment: Standards for Retailers, Wholesalers, Manufacturers and Auto Salvage Yards. 329 IAC 3.1-11.1-3 requires that if batteries are stored in containers, the container must be in good condition and be a covered container. 328 IAC 3.1-11.1-3 should also require that if batteries are shipped in containers, for any reason, then the container must have sufficient structural integrity to contain the spent lead acid batteries during shipment and the container must be a covered container. This requirement would make subsequent handling of the batteries safer. (BT)

Response: IDEM does not have authority to regulate shipping containers. Shipping containers are under the jurisdiction of Indiana Department of Transportation, therefore, IDEM will not add any additional requirements. The draft rule does not prevent lead acid battery handlers to require such containers be used for shipping as a condition of acceptance.

Comment: Requirements Applicable to Reclaimers. The purpose of this rulemaking is to make Indiana's hazardous waste management rules reflect the way reclaimers have historically handled whole spent lead acid batteries by staging them in trailers and subsequently offloading the spend lead acid batteries from the trailers into battery wreckers. This management practice reduces double handling costs. However, IDEM proposes to also impose new and unnecessary requirements on reclaimers. (BT)

Response: IDEM does not agree that the only purpose of this rule is to make the IDEM rules reflect the way reclaimers have historically handled whole spent lead acid batteries. The

purpose of this rule is to assure staging and other activities that have historically been issues are done in a manner that is protective of human health and the environment. This rule will bring clarity and consistency to lead acid battery management in Indiana.

In addition, reclaimers often store batteries in areas after off-loading from trailers and prior to reclamation. Therefore, IDEM is providing clarification in 329 IAC 3.1-11.1-5(c) by adding the word "permitted" before "storage".

Comment: 329 IAC 3.1-11.1-5(c) should be revised in two ways. First, the rule should allow for staging of batteries for up to 14 scheduled operating days. This would provide needed flexibility for different operations when not all equipment operates either all the time or every day. Second, the requirements to inspect trailers from the outside within twenty-four (24) hours should be dropped. While this requirement is safer than what IDEM had previously required having the inspector walk across the top of the batteries inside the trailer, this inspection requirement still poses a safety hazard. Employees would either have to climb up on the back of the trailer to view the batteries or inspect using a step ladder. While this may be a safer to inspect, even if an employee looks into the trainers from the outside, it is doubtful that the employee could see any leaking batteries at the head end of the trainer or to be able to readily tell if a pallet has overturned. Exterior inspection of the trailers for signs there are leaking batteries in the trailer (and taking appropriate action if a leak is discovered) provides sufficient environmental safeguards and reduces the risk of falls associated with inspecting the trailers. (BT)

Response: IDEM believes that fourteen (14) calendar days are more than adequate and that tracking "operating time" is overly complex to enforce. At one time, U.S. EPA requested comments on allowing fourteen (14) calendar day staging on batteries held in trailers, but never adopted the provision. Based on prior discussions with the US EPA, IDEM believes that these rules would be challenged if more than fourteen (14) calendar days of staging were allowed. IDEM also believes that fourteen (14) days of battery staging needs to be coupled with the associated management requirements proposed here to protect human health and the environment.

IDEM does agree that exterior inspection of trailers for signs of leakage is adequate, when in conjunction with the surface management requirements of these rules, and has revised the rules accordingly. IDEM also agrees the tracking and enforcement of the twenty four (24) hours from arrival time adds complexity for facilities and inspectors and has revised the rules to eliminate that time frame.

Comment: Finally, 329 IAC 3.1-11.1-5(d), (e), (f) and (g) imposes requirements which IDEM has never demonstrated are needed and which are contrary to Indiana's hazardous waste rules. Moreover, the requirements are not imposed on any other hazardous waste reclaimers. 329 IAC 3.1-11.1-5(d), (e), (f) and (g) should be deleted. (BT)

Response: IDEM disagrees. Singling out spent lead acid batteries for specific regulation was initiated by the US EPA. Every item in the draft rule contained in this notice is in response

to past concerns with battery reclaimers, enforcement issues, and the clarity of current rules, all of which have been encountered during the last twenty-nine (29) years of inspections and enforcement experiences with lead acid battery handlers.

Comment: Standards for intermediate storage. IDEM has not demonstrated that there is a need for the requirements set out in 329 IAC 3.1-11.1-3. This rule imposes requirements that are not imposed on entities handling batteries under the Universal Waste Rule. If IDEM wishes to identify the locations where intermediate storage is being conducted, it could require notification by those entities conducting intermediate storage. IDEM has not demonstrated an environmental basis for the requirements in 329 IAC 3.1-11.1-3 and it should be deleted. (BT)

Response: IDEM believes BT is referring to 329 IAC 3.1-11.1-4 which are the standards for intermediate storage facilities. As indicated in the response to BCI's similar comment above, IDEM has removed the spill response plan requirement making it consistent with the Universal Waste rules cited. The rule does require notification for large quantity intermediate storage facilities section (2)(A) also consistent with the universal waste rules.

Comment: Closure and Corrective Action. IDEM has not provided any evidence that 329 3.1-11.1-7 is necessary. 329 IAC 3.1-11.1-7 imposes requirements on persons handling spent lead acid batteries that are not imposed on persons who handle batteries under the Universal Waste Rule. Finally, the requirements are duplicate of other requirements that already apply to entities managing waste under the RCRA requirements. 329 IAC 3.1-11.1-7 should be deleted. (BT)

Response: IDEM disagrees that the agency is limited in this rulemaking by the scope of existing rules. The commentor is confusing "intermediate storage facilities" regulated in section 4 of the draft rule with "intermittent storage" which is addressed in the standards for reclaimers in section 5 of the draft rule. 329 IAC 3.1-11.1-7 was added to clarify that if contamination at the unpermitted intermittent storage areas units cannot be removed the department will address the matter in accordance with the department's risk integrated system of closure (RISC). All intermittent storage areas at existing facilities are either subject to the standards for existing facilities in section 5(e), corrective action, or subject to existing variances.

The commentor is correct in that this section is somewhat redundant. These rules are intended to provide clarity and consistency to the management of spent lead acid batteries. The redundant portions of this language is intentional and must be referenced as a lead in to the language addressing RISC.

IDEM has removed the reference to 329 IAC 3.1-11-2(3). That section of the rule is no longer necessary, as those requirements are now at section 5(a) of this rule.